

No. 23-

In The
Supreme Court of the United States

Joe Lawrence Gallegos,
Petitioner,

v.

United States of America,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether acting on the immediate instinct for self-preservation constitutes acting for the purpose of “maintaining or increasing position in an enterprise,” for purposes of VICAR murder when the need for self-preservation arises out of the defendant’s gang status.

PARTIES TO THE PROCEEDING

Petitioner Joe Lawrence Gallegos is currently serving a life sentence in USP Victorville in Victorville, California.

Respondent is the United States of America, acting through the United States Attorney's Office for the District of New Mexico.

RELATED PROCEEDINGS

United States v. Garcia, 74 F.4th 1073 (10th Cir. July 5, 2023) Docket No. 19-2148.

United States v. Deleon, Docket No. 2:15-cr-4268-002-JB (D.N.M. April 21, 2020).

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The decision of the United States Court of Appeals for the Tenth Circuit is reported at 74 F.4th 1073 (10th Cir. 2023)

JURISDICTION

After entering judgment originally on April 17, 2023, the court of appeals entered an order on May 2, 2023 requiring the parties to respond to the government's petition for rehearing. On July 5, 2023, the court of appeals entered an order reopening the appeal and granted in part the government's motion. The court of appeals entered the judgment sought to be reviewed on July 5, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

Title 18 U.S.C. Section 1959 provides in pertinent part:

(a) Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . shall be punished

(1) for murder, by death or life imprisonment.

STATEMENT OF THE CASE

In March 2001, Petitioner Joe Gallegos was serving a sentence in the Southern New Mexico Correctional Facility (“Southern”) and was a member of a violent prison gang known as the “*Sindicato de Nuevo México*,” or

the “SNM.” Nevertheless, Mr. Gallegos had not committed violence for the gang, and the gang had put a “green light” on him, meaning it had targeted him for death.

The SNM leadership at the time was unhappy that, at the Southern facility, a number of gang members targeted to be “hit” were not being hit. On March 20, 2001, Billy Garcia, “Wild Bill,” an SNM leader, moved into the general population at Southern with orders to “clean house.” Mr. Garcia was the highest ranking SNM member at Southern. Mr. Garcia ordered SNM member Leonard Lujan to create two separate teams to kill two of the SNM members with green lights, Frank Castillo and Rolando Garza.

Mr. Lujan decided to order Joe Gallegos (the Petitioner here) to be on the team to kill Frank Castillo. Mr. Lujan testified at trial that he “told Joe, I told him . . . that Wild Bill wanted Pancho [i.e., Frank Castillo] hit. But he gave me permission to choose who I wanted

to choose. So I told Joe, ‘I’m choosing you.’” Lujan told him that “Wild Bill wanted it by strangulation early in the morning.” Lujan testified that he had also put a “kill team” in place to kill Joe Gallegos and his team if they did not carry out the murder of Castillo. On the morning March 21, 2001, SNM members Sleepy, Smurf, Scotty, and others, had already hidden shanks in the yard, ready for stabbing to death Joe Gallegos and his team, should they fail to kill Castillo. That morning, both Frank Castillo and Rolando Garza were found strangled in their beds.

Mr. Gallegos was eventually prosecuted in the United States District Court for the District of New Mexico for Violent Crimes in Aid of Racketeering (“VICAR”), 18 U.S.C. § 1959, for the murder. The district court had jurisdiction under 18 U.S.C. § 3231.

On appeal, Mr. Gallegos argued that the government had failed to show that he had killed Mr.

Castillo in order to maintain or increase his position with the gang, as necessary for him to commit a VICAR murder. Specifically, he argued that he was under a very credible threat of immediate death were he to fail to kill Mr. Castillo as ordered, and no evidence, let along sufficient evidence, showed that he would have been inclined to commit the murder without such a threat, whether to maintain or increase his gang status, or otherwise. He did not seek the assignment to kill Mr. Castillo, and as a prison inmate he could not escape the threat against himself. His desire for self-preservation obliterated any other motive, as it would for any other human being. Hence, the duress and coercion under which he killed Castillo negated the purpose element, i.e., to maintain or increase his position in the gang.

The court of appeals disagreed, finding that Mr. Gallegos' self-preservation motive was one and the same as a motive to increase his status with the gang because

his need for self-preservation arose from his poor gang standing. *See United States v. Garcia*, 74 F.4th 1073, 1122 (10th Cir. 2023).

SUMMARY OF THE ARGUMENT

The Tenth Circuit erred by holding, as a matter of law, that acting out of self-preservation under a credible and immediate threat of death will constitute, if the threat comes from the racketeering enterprise itself, the very “maintaining or increasing position” purpose (hereinafter “gang-status”) required for a VICAR murder.

See United States v. Garcia, 74 F.4th 1073, 1122 (10th Cir. 2023) (“The fact that Joe Gallegos’s [sic] life was in danger due to poor standing in SNM is not only consistent with a VICAR purpose but supports finding a VICAR purpose, because it shows his motive for improving his

status in SNM.”).

The Tenth Circuit reasoned that, “Motive, unlike *mens rea*, is not an essential element of a criminal offense. It is an explanation that may tend to make a party’s theory of the case seem more plausible or understandable.” *Garcia*, 74 F.4th at 1122 (quoting *United States v. Santistevan*, 39 F.3d 250, 255 n.7 (10th Cir. 1994)). This was an odd point to make because motive (or “purpose” if you prefer) *is* an element of VICAR murder, and it was the point of the appeal. Nevertheless, treating motive as a distinct concept from the essential “purpose” element permitted the court to conclude that, “there can be many underlying *motives* for committing a crime, all with the *purpose* of increasing status in a gang.” *Id.* (emphasis added). Mr. Gallegos would agree that a single purpose may create a motive to commit a *variety of acts*. But it is difficult to conceive how a single purpose can spawn a *variety of motives*. They are simply

not separate concepts in that way.

Nevertheless, the court of appeals' conclusion that an immediate need to act in self-preservation is subsumed into a gang-status purpose as long as the need for self-preservation originates from the gang-status itself has at least three flaws: 1) it confuses causation with purpose; 2) it treats "motive" and "purpose" as though they were separate and independent concepts; and 3) it conflates two purposes into one and thereby allows only an incidental gang-status purpose to be sufficient for a conviction.

A. The court of appeals' holding confuses purpose with causation.

Truly, Mr. Gallegos was under an immediate threat of violent death because he had been ordered by the gang hierarchy to kill Castillo or be killed himself (immediately). It may be that the gang put him in that situation because of his low status, as reflected by the

“green light” out on him. But this merely explains the *cause* of his predicament, not his purpose in obeying the order.

In *United States v. Hackett*, the government argued that it had proved the defendant’s gang-status purpose because the defendant had shot an individual as a “direct result” of the gang’s conflict with that individual. *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014). The Sixth Circuit rejected the argument, pointing out that it was an “argument about causation, not purpose. And the government otherwise does not explain why proof of causation amounts to proof of purpose on the record here.” *Id.* The Sixth Circuit went on to “agree with the Ninth Circuit that VICAR does not extend ‘to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang.’” *Id.* (quoting *United States v. Banks*, 514 F.3d 959, 968

(9th Cir. 2008)). “Otherwise, in gang cases, the purpose element would be a mere tautology.” *Id.* Likewise, here, Mr. Gallegos’ gang membership and his green light may explain the cause for his being ordered to kill Castillo, but it does not convert his extreme motivation to preserve his own life into a mere desire to maintain or improve his gang status.

B. The court of appeals treats “motive” and “purpose” as though they were separate concepts in order to treat self-preservation and gang-status as a single purpose.

“Purpose” and “motive” are synonyms. In fact, without drawing any attention, the words “motive” and “purpose” are used interchangeably. *See e.g., United States v. Gooch*, 665 F.3d 1318, 1317 (D.C. Cir. 2012) (emphasis added) (“The VICAR statute criminalizes murder . . . with one of three *motives*: (1) . . . (3) for the *purpose* of . . . maintaining or increasing position” in the racketeering enterprise.); *see also United States v. McGill*,

815 F.3d 846, 930 (D.C. Cir. 2016) (emphasis added)

(“[B]oth economic and noneconomic *motives* may form the requisite common *purpose* for a RICO association-in-fact.”); *United States v. Diaz*, 176 F.3d 52, 94-95 (2d Cir. 1999) (emphasis added) (referring to “the *purpose* of maintaining or increasing a position in a RICO enterprise” as the “*motive* requirement”).

In any event, the result of the court of appeals’ rationale that “there can be many underlying motives for committing a crime, all with the purpose of increasing status” was to treat Gallegos’ self-preservation purpose as indistinguishable from a gang status purpose because his need for self-preservation was derivative of his gang status. It allowed the court to avoid addressing whether the gang-status motive was merely incidental to his need for survival.

The reasoning is unsound. As a matter of human nature or animal instinct, a gang-status motive cannot

subsume a self-preservation motive. In fact, the opposite is true. True self-preservation obliterates any other motive, simply as a matter of human instinct. Moreover, the conclusion discounts the clear import of the statute's language. A gang-status purpose simply does not include the basic instinct of self-preservation, at least not when self-preservation is truly and immediately at play.

The issue might have been different had Mr. Gallegos killed Castillo to avoid the *potential* of being killed at some point in the future. That may have been a gang-status calculation, and other alternatives could have been considered. But, under a very credible threat of immediate and violent death, gang status considerations are no longer motivating the individual—just survival.

C. The court of appeals' holding conflates two purposes into one and thereby allows only an

incidental purpose to be sufficient for conviction.

The courts of appeals are not completely consistent in their approach to dual-purpose VICAR cases, but those that have addressed it agree that an incidental gang-related purpose is not sufficient, regardless of how they otherwise define the standard. *See United States v. White*, 7 F.4th 90, 101 (2nd Cir. 2021) (requiring that “maintaining or increasing position” in the enterprise be at least the “general” purpose); *see also United States v. Simmons*, 11 F.4th 239, 274-75 (4th Cir. 2021) (applying a “general purpose” standard); *United States v. Hackett*, 762 F.3d 493, 500 (6th Cir. 2014) (requiring that gang-status be at least the “animating purpose” and explaining that it is not “enough if the defendant’s gang-related purpose was ‘merely incidental’ to his action.”); *United States v. Phillips*, 239 F.3d 829, 845 (7th Cir. 2001); *United States v. Banks*, 514 F.3d 959, 969 (9th Cir. 2008) (holding that VICAR does require that the “gang-related

purpose . . . be more than merely incidental.”);

To be sure, the Tenth Circuit has also applied the “general purpose” standard. *See United States v. Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005). However, the court’s holding here breaks new ground. The melding of self-preservation into a gang-status motive is inconsistent with the “general purpose” or “animating purpose” standards of the other courts of appeals.

Conflating the two purposes into a single gang-status purpose allows a conviction, and a mandatory life sentence, when the required gang-status motive is merely incidental.

REASONS FOR GRANTING THE PETITION

- A. The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court.**

This Court has never addressed the purpose element for murder under 18 U.S.C. § 1959, and the standard is unclear when the evidence shows that the defendant had more than one purpose for his act. The Supreme Court should clarify the standard because a conviction carries a mandatory life sentence.

The new rule must not be that a genuine self-preservation motive in an immediate and inescapable situation becomes a gang-status motive simply because the defendant would not have been in the predicament were it not for his poor standing with the gang. This would stretch the meaning of “for the purpose of maintain or increasing position” much too far. Moreover, in situations like this, such a rule would tend to make gang membership itself the deciding factor and the purpose

element a mere tautology.

B. The Tenth Circuit’s decision is in conflict with the decisions of other courts of appeals on the same important matter.

The court of appeals’ decision conflicts with the standard employed by other circuits whereby gang-status must be more than the defendant’s incidental purpose. Rather, it must be at least his “general” or “animating” purpose, depending on the circuit. Moreover, the Supreme Court should take this opportunity to define whether the standard is “general purpose” or “animating purpose” and otherwise to provide guidance for dual-purpose VICAR cases.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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